IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2671 OF 2005

M/s.Ravi Shakun Apartments
Private Limited. ... Petitioners.

V/s.

1. The Municipal Corporation
   of Greater Mumbai.

2. The Executive Engineer
   (Building Proposal).

3. The Assistant Commissioner.

4. Jennifer Fernandes. ... Respondents.

Shailesh Shah i/b. Nachiket G. Bhatt
for the petitioners.

N.V.Walawalkar with Mrs.A.R.Joshi
for respondent Nos.1 to 3.

S.A.Bhagwat for respondent No.4.
for the respondents.

CORAM: V.C.DAGA, J.

DATED: 29th March 2006.

JUDGMENT :

Heard.

Rule, returnable forthwith by consent of parties.

All the respondents waive service.

Perused petition and the annexures annexed thereto.

2. The petitioners in this petition are seeking direction against respondent Nos.1 and 2. to issue sanction and/or approval to their application dated 20th May, 2004 whereunder they are seeking restoration and/or reconnection of the drainage line, pipes and ducts connecting 2nd to 5th floor of the petitioner's building "Ravi Shakun Apartments" situate on plot No.7, Mira Baug Road, Santacruz (West), Mumbai- 400 054.

3. The petitioners claimed to have submitted proposal for construction of four additional floors on the existing building and two floors on the open land located on the rear side of the structure referred to hereinabove. The proposal of the petitioners was duly approved by respondent No.3, the Assistant Commissioner of respondent No.1- Corporation, H/West Ward, on 30th May, 1984. Sometime in July, 1986, an Occupation and Drainage Completion Certificate was granted by respondent No.3 to the newly

constructed part of the building.

4. It appears that from 1985 to 1995-96 i.e. for about 10 years, there was no complaint of any leakage or seepage or defect in the additionally constructed floors of the existing building. However, somewhere in the year 1996, respondent No.4 appears to have made several complaints to the respondent No.1- Corporation and its officers with regard to the leakages and seepage in the hall of her flat located on the first floor of the subject building.

5. When respondent No.4 found that her complaints were not attended by the respondent No.1- Corporation, she chose to file L.C.Suit No.6648 of 1986 against respondent No.1 in the City Civil Court of Bombay to seek mandatory order of injunction directing respondent No.1 to alter, modify and/or remove the entire drainage line and drainage duct of water closets and bathrooms of the flats located on 2nd to 5th floor of the subject building. The suit was filed against the Corporation alone without joining the petitioners and other occupants as parties to the suit.

6. The suit was tried by the City Civil Court, Mumbai. The respondent No.1- Corporation did not produce any approved plan on record to contend and establish that drainage lines and/or pipes and/or ducts were as per the approved

plans. With the result, suit came to be partly decreed by judgment and order dated 19th November, 1998. By decree of mandatory injunction, respondent No.1- Corporation (defendant therein) was directed to modify, alter, remove the drainage line and drainage duct of water closets and bathrooms of the flats located on 2nd to 5th floor i.e. the flats located just above the first floor flat owned, possessed and occupied by respondent No.4.

7. The petitioners unsuccessfully claimed to have preferred third party appeal against the aforesaid judgment and decree dated 19th November, 1998.

8. The respondent No.4 sought execution of the aforesaid decree dated 19th November, 1998. In execution of decree, Mayor's chair and table were attached. Ultimately, decree came to be executed. Drainage pipes and ducts located from 2nd to 5th floors of the subject building were removed.

9. It appears that in order to avoid the legal battle, the petitioners were advised to make fresh application to seek permission for reconnection and restoration of drainage connection as the female members and children of the occupants of other flats were suffering undue hardship. The petitioners, thus, applied

to the Corporation for restoration of drainage line after making suitable alterations in their plan. Petitioners had urged, in the application, that they were the owners of the building; they were never made a party the suit; no notices were ever issued to them; they were never heard and, that no chance was given to them to make necessary alteration and/or modifications in the pipe lines referred to in the decree and that behind their back decree came to be passed as such it is not binding on them.

10. In the application, the petitioners had also stated that in the proposed plan a provision was made to put double slab and install pipes raised by one foot which were formerly embedded in the flooring slab. It was further pointed out that latest material was to be used for water proofing and the drainage line was to be diverted in such a way so as to make it visible and convenient for maintenance. The petitioners had also agreed to furnish written undertaking so that in future, if any leakage or seepage occurs, it would be the responsibility of the petitioners to repair it.

11. With the above nature of application for permission for reconnection and restoration of drainage lines, the petitioners approached respondent No.1- Corporation. It appears that the Corporation did not concede to

the request or prayer made by the petitioners and, ultimately, their request was turned down.

12. In the aforesaid backdrop, the present petition is filed under Article 226 of the Constitution of India to seek directions against the respondent No.1- Corporation.

13. During the course of hearing, learned counsel for respondent No.4 brought on record the decree passed by the City Civil Court in L.C.Suit No.6648 of 1996. Respondent No.4 further raised objection to the fresh proposal submitted by the petitioners to the Corporation on the ground that there was a decree for permanent injunction against the Corporation. That acceptance of any such proposal of the petitioners would be in violation of the terms of the decree.

14. The respondent No.1- Corporation has filed its counter affidavit duly affirmed by Shri A.R. Pawar, Sub-Engineer, H & K/E Ward, Bandra to oppose this petition. Apart from the decree sought to be pressed into service by the learned counsel for the respondent referred to in para-9 (supra), the rspondent No.1- Corporation has admitted in its affidavit that the they have received proposal of the petitioners to seek permission for re-construction and restoration of drainage connection through their Architect on 20th May, 2004. However,

as pr regulation 38-iv(b) of the D.C.R., 1991, no bathroom or WC is permitted directly over any room other than WC, washing place, bathroom or terrace unless the floor is made impervious with adequate water proofing treatment. However, in no case WC or bathroom can be provided over the kitchen. The Corporation has also stated that in the present case, the petitioners have failed to maintain waterproofing and imperviousness of the floor below toilet and, thus, the proposal of the petitioners was rejected. The Corporation has stated that the proposal of the petitioners is not in conformity with D.C.R., 1991 and also contravenes the provision of section 251A of the Bombay Municipal Corporation Act, 1988 ("BMC Act" for short). The Corporation has further stated that there is no consent of respondent No.4 and, hence, the proposal submitted by the petitioners cannot be accepted. In this backdrop, the learned counsel for respondent No.1- Corporation submits that the petition is liable to be dismissed with costs.

15. This petition was heard on more than two or three occasions. Each time parties to the petition sought time to work out this matter. As a matter of fact, minutes of orders were also prepared by the parties, which were more or less acceptable to all of them. However, the same could not acted upon in view of the objection taken by respondent No.4 contending that the provisions of section 251-A of the BMC Act are required to be complied with.

Learned counsel for respondent No.4 also pressed in to service the decree of the City Civil Court in Suit No.6689/1996 obtained by her against the respondent No.1- Corporation to which the present petitioners are not a party.

16. Having heard rival parties and considering broader consensus reached between the parties, clearing stumbling block sought to be created by respondent No.4, who is armed with decree in Suit No.6684/1996, I propose to dispose of this petition on the broader consensus reached between the parties.

17. At the outset, it is necessary to mention that respondent No.4 had filed suit against the Corporation without joining the present petitioners as party to the suit. It is a settled proposition of law that decree of the Court cannot bind a person who is not party the decree. Since the petitioners are not party to the decree obtained by respondent No.4, the said decree is not binding on the petitioners. However, the decree will very well bind the respondent No.1- Corporation. If that is so, let me examine the nature of the decree passed by the City Civil Court in Suit No.6689/1996. Decree was granted in terms of prayer clause (a) of the plaint. Prayer clause (a) reads as under:

(a) that the Defendants, their servant,

> agents, be ordered by mandatory order and injunction to modify, alter, remove the drainage line and drainage duct of water closet and bathrooms from second to fifth floor, led above the first floor of the flat situated in building known as Ravi Shakuyan Apartments, situated at plot No.83, C/7, T.P.S.II, Mira Baug, Santacruz (West), Mumbai 400 054 in order to prevent leakage of water from the aid pipes and the duct in the said flat within time, as this Hon'ble Court, deem fit and report the compliance thereof,"
>
> (Emphasis supplied)

18. The perusal of prayer clause (a) would go to show that the respondent No.1- Corporation (defendant therein) was permitted to modify; alter; remove drainage line and drainage duct of water closet and bathrooms of the flats from 2nd to 5th floors located above the first floor of the building known as "Ravi Shakun Apartments", Mumbai. In the execution of the decree, the drainage line and drainage duct of the water closet and bathrooms of the above-referred flats were removed. However, this decree of injunction also permits modification; alteration of the drainage line. Decree has also been executed. There is no decree of permanent injunction.

19. At this stage, learned counsel for respondent No.4 submits that in view of section 251 of the BMC Act, proposal of the petitioners cannot be considered. Perusal of the findings recorded

by the City Civil Court in the light of the prayer clause (a) granted, would show that though the bathroom was constructed over the living room of the respondent No.4 (plaintiff therein), still removal thereof was not directed in the decree of the City Civil Court.

20. With the aforesaid understanding of the decree and material on record; as also keeping in view the suggestions given by the parties to the petition; I propose to dispose of this petition with the following directions:

(i) The Executive Engineer, H/West Ward shall decide the application made by the petitioners strictly on merits and on the basis of D.C.Regulation No.38(iv)(b) and Building Regulation No.17.4.3(b), maximum within four weeks from the date of this order.

(ii) The Executive Engineer, H/West Ward shall not insist upon consent of respondent No.4 for considering and granting petitioner's application dated 20th May, 2004 being Exh.”H” to the petition; in view of inter se dispute and shall consider the same on its own merits as per D.C. Regulations and Building Regulations.

(iii) The Executive Engineer, H/West Ward

shall be free to put any legal requisite condition for grant of petitioners' application and the petitioners shall comply with all such conditions.

(iv) The petitioners shall undertake that on grant of permission, they will carry out the work of drainage connection strictly in accordance with D.C. Regulation No.38(iv)(b), by making the floor impervious; with adequate water proofing treatment, and by ensuring that no leakage whatsoever is caused to the premises of respondent No.4 in future, and construction of pipe line shall be in accordance with the plan so sanctioned.

(v) In the event of there being any leakage or seepage in the premises of any of the occupants including the premises of respondent No.4 (located on first floor) due to any defect in the drainage pipes laid by the petitioners, it shall be the duty of the petitioners to carry out necessary repairs at their own costs within seven days from the date of receipt of any complaint/ intimation in that behalf either from respondent No.4 or any other occupant.

(vi) The petitioners shall carry out the work under supervision of licensed plumbers

and Architect to be appointed by them, and shall commence user thereof only on the work being approved by respondent No.1-Corporation.

(vii) In the event of any further litigation against respondent Nos.1 to 3 by and from respondent No.4, the petitioners shall undertake to indemnify respondent Nos.1 to 3 against all actions, damages, consequences and/or costs arising out of any such litigation provided such litigation is confined to any fresh complaint of leakage arising out of the work done pursuant to the permission granted by the Corporation.

(viii) While considering application made by the petitioners, it shall be open for the respondent No.4 to lodge any legal objection, and the Executive Engineer, H/West Ward shall be free to decide the same on its own merits strictly in accordance with law after granting opportunity of personal hearing to the parties.

21. Petition stands disposed of accordingly. Rule is made absolute in terms of this order with no order as to costs.

(V.C.DAGA, J.)